No. 72-844

In the Supreme Court of the United States

OCTOBER TERM, 1973

E. E. FALK, ET AL., PETITIONERS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

508-912—73——1

CITATIONS

Cases—Continued

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. D) is reported at 439 F. 2d 340, certiorari denied, 404 U.S. 827. Its second opinion (Pet. App. A) is unreported. The first opinion of the district court (Pet. App. E) is reported at 312 F. Supp. 608. Its supplemental opinion on remand (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1972. A petition for a writ of certiorari was filed on December 8, 1972, and was granted

on February 26, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, for purposes of the "enterprise" coverage provisions of the Fair Labor Standards Act, the "annual gross volume of sales made or business done" by petitioners as part of their general real estate brokerage and management activities should be determined by the gross rentals which they collect from the tenants who occupy the buildings which they manage and operate for the building owners, or by the commissions which petitioners deduct from the gross rentals.

2. Whether the building maintenance workers whom petitioners hire, fire, and supervise are employed in petitioners' building management enterprise.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in petitioners' brief at pp. 2–4.

STATEMENT

This suit was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, to restrain petitioners from violating the Act's minimum wage (Section 6(b)), overtime (Section 7(a)(2)) and recordkeeping (Section 11 (c)) provisions, and from continuing to withhold unpaid wages due certain building maintenance employees. Petitioners stipulated the amounts that would

be due under the Act's minimum wage and overtime provisions (App. 37), but denied that they were "employers" of the maintenance workers or that they were an "enterprise" subject to the Act's requirements. The district court sustained these contentions and dismissed the complaint, but the court of appeals reversed, and, on remand, the district court entered judgment enjoining further violations of the Act and directing petitioners to pay the stipulated amounts together with interest at six percent. This supplemental judgment was upheld by the court of appeals.

1. Petitioners, partners in the firm of Drucker & Falk, are engaged in various real estate brokerage and management activities, including the operation and management of some 30 apartment buildings located in various cities in Virginia (App. 13–16, 26, 40). These management activities are carried out pursuant to contracts with the building owners. Under these contracts, petitioners "stand in the shoes of the owner" (App. 41) and perform all of the functions required for leasing, maintaining, and operating the apartment buildings. They advertise the availability of apartments for rent;[1] sign, renew, and cancel leases; collect rents; institute, prosecute and settle all legal proceed-

[1] A "typical" advertisement consists of a map showing the location of several projects and containing the caption "THAT'S US ALL OVER" and the name "DRUCKER & FALK" in large capital letters (App. 34, 38–39). Prospective tenants are directed either to the partnership's main offices in Newport News or to "Drucker & Falk" at the apartment location (App. 39).

ings for eviction, possession of the premises, and unpaid rent; make repairs and alterations; negotiate contracts for electricity, gas, fuel, water, telephone service, window cleaning, rubbish removal, repair work, and other services; purchase supplies; pay all bills, including mortgage payments, taxes, insurance, etc.; prepare an operating budget for the owner's review and approval; submit periodic reports to the owner; and hire, discharge, and supervise all labor and employees required for the operation and maintenance of the premises (App. 40–42, 51–53, 58–61). The participation of the building owners, some of whom reside outside the State, is limited to their review and approval of the budgets prepared by petitioners and periodic visits to their buildings (App. 18–19, 45).

Petitioners conduct these building management activities from their main office in Newport News, under the direction and control of their "management department." This department is staffed by an Executive Director, who has overall responsibility for the operation and management of the 30 apartment buildings, an Assistant Executive Director, and six area managers, each of whom is "responsible for supervising and enforcing management policies" at one or more of the buildings (App. 28, 43). These individuals are admittedly employees of the petitioners (App. 31). Other admitted employees include the rental agents and clerical personnel hired to operate the rental offices, collect and deposit rents, take tenant complaints, maintain office records, and transmit re-

ceipts and other information to petitioners' main office (App. 43).[2]

In addition to these employees, petitioners assign a maintenance superintendent or project manager to each building or building complex. These superintendents are hired by petitioners and work under the direct control of the six area managers in petitioners' main office (App. 34, 43–44). Subject to petitioners' approval, the superintendents hire, fire, and supervise the maintenance employees necessary for the operation of the building or buildings to which they are assigned (App. 44–45). More than 100 superintendents and maintenance workers are required to operate the 30 buildings managed by petitioners, and it is their wages which are the subject of this action (App. 28–31; Pre-trial Exh. 2). Although these workers are labelled by the contracts as "employees of the project owners" (App. 40, 42, 53, 60), they "may not know who the owners * * * are" (App. 46); they are hired by petitioners, either directly or indirectly, and they "look to [petitioners] for supervision and direction" (App. 34, 45–46). It is petitioners who establish their hours and wages, acting within the limits of the budgets they prepare for each owner (App. 41, 43–45). Petitioners also arrange for transfers and promotions (App. 46), including the occasional promo-

[2] Although there were some instances in which these employees were carried on the payroll of the building owner, they were nonetheless supervised and paid by petitioners (App. 40–43, 50). In any event, none of these employees received wage payments which would be substandard under the Act.

508-912—73——2

tion of a maintenance worker to a superintendent position or transfer of a maintenance worker or superintendent from one project to another having a different owner (App. 46; see also the employment history of C. E. Crayton in Pre-trial Exh. 2). Such transfers or promotions are initiated by petitioners "with the knowledge of the owners" (App. 46). Owner approval is obtained to use employees attached to particular projects at other projects which are too small to warrant a full-time staff (App. 47). When this occurs, the maintenance work at the smaller buildings is performed at cost. In other cases, the superintendents and maintenance employees work jointly at two different projects having different owners (App. 47).

Petitioners, under the name of Drucker & Falk as agent, pay all the expenses incurred in operating and maintaining the apartment projects, including the wages of the building service employees, from rent receipts deposited into local customer accounts (App. 41, 43–45, 52, 60). Rents from the several buildings managed by petitioners totalled $7,725,600.86 in 1967 and $8,607,086.04 in 1968 (App. 17). Payments are transmitted to the building owners on a periodic basis, after petitioners have deducted their commissions—which totalled $434,228.15 in 1967, and $462,757.50 in 1968—and paid the other expenses (App. 17–18). If disbursements are in excess of gross receipts, the owners are required to reimburse petitioners (App. 41).

2. When the case was first before it, the district court held that petitioners' building management activ-

ities were not covered by the Act on the ground among others, that they did not meet the dollar-volume test prescribed by Section 3(s)(1) in that the "annual gross volume of sales made or business done" must be measured by petitioners' commissions and not by the gross rentals received from the several buildings (Pet. App. E, pp. 29–40). The district court also agreed with petitioners that the building superintendents and other maintenance workers were "employees of the project and not employees of [petitioners]" (*id.* at 39).

The court of appeals reversed. It first rejected petitioners' contention that they were not the employers of the workers at the apartment projects. In concluding that the requisite employment relationship existed, the court noted the liberality with which the courts have traditionally viewed the issue of employment status for purposes of coverage under the Act and the character and extent of petitioners' control over the employment, discharge, and supervision of the workers (Pet. App. D, pp. 19–21). It next held that petitioners' activities at the various buildings constituted a single "enterprise" for coverage purposes (*id.* at 21–23). Third, it held that the proper measure of the size of petitioners' enterprise was the gross rentals collected rather than the commissions thereon; it reached this conclusion on the basis of the settled proposition that rental of property constitutes a "sale" within the meaning of the Act's enterprise coverage provisions (*id.* at 24), and its view that Congress intended coverage to turn upon the impact of an enter-

prise on commerce, which, in this case, is more fairly measured by "the gross volume of rents it collects, not just the amounts it is entitled to pocket" (*id.* at 25).

Petitioners sought review by this Court, but their petition was denied (404 U.S. 827), and, upon remand of the case to the district court, judgment was entered for the Secretary restraining violations and ordering restitution in the amounts which had been stipulated to be due the employees, together with interest (Pet. App. B, pp. 3–10). This judgment was affirmed by the court of appeals (Pet. App. A, pp. 1–2). Petitioners again sought review by this Court, and their petition was granted, but, in view of the Court's decision in *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512 (which approved the court of appeals' construction of the "enterprise" definition of Section 3(r) in the instant case), review was limited to the "gross sales" and "employment" issues (Questions 2 and 3 in the petition for certiorari).

SUMMARY OF ARGUMENT

1. The court of appeals was correct in determining that petitioners' enterprise met the dollar volume test for coverage under Section 3(s)(1) of the Act on the basis of gross rentals generated by petitioners' building management activities, rather than considering only commissions. The statutory test is not the magnitude of an enterprise's income or profits, but rather the "annual gross volume of sales made or business done." Leases of real property have long been recognized as "sales" for purposes of the Act, and it is undisputed that petitioners make leases with apartment tenants generating annual rentals of about $8,-

000,000. Petitioners would have the Court consider only the sales of their building management services made to the building owners, which are concededly to be measured by the commissions paid them for such services. However, coverage in this case is predicated not on the sales of management services but on the sales of building space made to tenants; these sales are made by petitioners and are rationally measurable only by the gross rentals received therefrom.

The holding of the court of appeals is consonant not only with the plain statutory language but also with the congressional purpose in adopting enterprise coverage and a dollar volume test in connection therewith. Congress utilized sales volume as the standard in order to reflect the impact of the activities of an enterprise on commerce, an impact that is unchanged in petitioners' case by the identity of the building owner. As the Senate Report accompanying the 1966 enterprise amendments to the Act explained, the dollar volume test "is intended to measure the size of an enterprise * * * in terms of the annual gross volume in dollars * * * of the business transactions which result from activities of the enterprise * * *." Application of this criterion to petitioners' leasing activities requires use of rents as the standard.

Measurement of petitioners' enterprise by the volume of rents generated is also consistent with the economic reality of the operations involved in the rental and management of the buildings. It is petitioners, not the building owners, who rent the space and supervise the maintenance of the buildings. Sim-

ilarly, petitioners, utilising the rental receipts they collect, purchase materials, supplies, and services necessary for all 30 apartment buildings they manage; petitioners' activities thus have the same effect on the flow of men, money, and materials across state lines as they would if petitioners themselves owned the buildings. The soundness of the approach to this issue taken by the court of appeals is confirmed by the fact that every other appellate court considering the same issue or a similar one has reached the same conclusion.

2. A similar line of reasoning supports the conclusion of the court of appeals that the building maintenance workers are employed in petitioners' enterprise and therefore entitled to the protections of the Act. The Act clearly defines an "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *" (Section 3(d)), a description plainly applicable to petitioners in their relation to the building personnel. The definition of the term "employ" in Section 3(g) as including "to suffer or permit to work" confirms this conclusion, since it is petitioners, not the building owners, who have control over the hiring, job assignments, and discharge of the building workers.

It is fallacious to characterize the employment relationship between petitioners and the building workers as one that is purely derivative from the workers' status as employees of the building owners (under the plain statutory language, that characterization would not, in any event, enable petitioners to avoid independent responsibility as an employer under the Act). Petitioners have their own business—different

from and independent of that of the building owners—of managing real property for others. The employees are indispensable to the conduct of that business of petitioners. Given this fact and the pervasive control by petitioners of the terms and conditions of the work of these employees, it is petitioners who, as a matter of economic reality, are the primary employers of the building personnel.

Again, as with the rents/commissions issue, uniform appellate precedent supports the court below in its determination that petitioners are subject to the duties imposed, for the benefit of their employees, upon employers operating covered enterprises. There is no basis in the language, history, or purposes of the Fair Labor Standards Act, or its amendments, for depriving the janitorial and maintenance personnel utilized by petitioners in the conduct of their apartment building management business of the benefits of the statutory minimum wage and maximum hours provisions, to which those employees are entitled under the plain terms of the amended Act.

ARGUMENT

I. THE GROSS RENTALS GENERATED BY PETITIONERS' BUILDING MANAGEMENT ACTIVITIES, NOT THE COMMISSIONS PAID BY THE BUILDING OWNERS, CONSTITUTE THE PROPER MEASURE OF THE "ANNUAL GROSS VOLUME OF SALES MADE OR BUSINESS DONE" BY PETITIONERS' ENTERPRISE

Petitioners first contend that their business is too small to meet the dollar volume requirements of the Act for enterprise coverage. This contention is based

on the premise that the dollar volume test should be applied solely to the commissions petitioners earn and not to the gross rentals generated by their building management activities—in other words, that consideration should be given only to the sales of petitioners' services to the building owners, and that petitioners' sales of rental property to the building tenants should be ignored. The court of appeals rightly rejected this contention, which is contrary to the language of the statute, runs counter to the congressional purpose reflected in the legislative history, ignores economic reality, and conflicts with a uniform line of decisions by the courts of appeals.

A. THE LANGUAGE OF THE STATUTE REQUIRES MEASUREMENT OF THE SIZE OF PETITIONERS' BUSINESS BY GROSS RENTAL VOLUME RATHER THAN MERELY COMMISSIONS

Section 3(s)(1) of the Act, 29 U.S.C. 203(s)(1), defines a covered enterprise as one "whose annual gross volume of sales made or business done is not less than $500,000[*] (exclusive of excise taxes at the retail level which are separately stated) * * *." It has been settled at least since *Kirschbaum* v. *Walling*, 316 U.S. 517, 526, that the leasing of property constitutes a "sale" for purposes of the Act, "sale" being defined in Section 3(k) to include "any sale, exchange, consignment for sale, shipment for sale, *or other disposition*" (emphasis supplied). See, *e.g.*, *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, 362 F. 2d 857, 863

[*] The $500,000 standard was in effect during the period covered by this suit. The standard was reduced to $250,000 as of February 1, 1969.

(C.A. 5); *Wirtz* v. *First National Bank and Trust Co.*, 365 F. 2d 641 (C.A. 10).

It is undisputed that the leasing of the property in this case is done by petitioners and that the annual dollar volume of these leases "sold" by petitioners approximated $8,000,000 during the years in question (App. 17). The plain language of the Act thus requires the conclusion that petitioners' enterprise is covered insofar as the dollar volume test is concerned.

Petitioners seek to avoid the consequences of the statutory language by suggesting that sales should be recognized only when or to the extent that they generate "actual funds received by the 'enterprise' for its own purposes" (Br. 12). Such a construction would not only read into the statute provisions that are neither present nor reasonably inferrable from its language, but would actually require that the express statutory directive be ignored. It is true, of course, that petitioners' commissions represent the correct measure of the dollar volume of the sales made by them to the building owners of their real estate management services, but those are not the only sales petitioners make and are not the sales which here create coverage under the Act; rather, the Act's coverage follows from petitioners' sales (rentals) of apartments to tenants, the amount of which is rationally measurable only by rents, not commissions.

B. THE LEGISLATIVE HISTORY AND PURPOSES OF THE DOLLAR VOLUME TEST FOR ENTERPRISE COVERAGE SUPPORT THE COURT OF APPEALS' RELIANCE UPON RENTS RATHER THAN COMMISSIONS

Not only is petitioners' contention that their rental activities should be ignored in determining the size

508-012—73——3

of their operation contrary to the unambiguous statutory language, it is also contradicted by the legislative history of Section 3(s)(1) and incompatible with the purposes of the enterprise coverage amendments.

The Act's enterprise coverage amendments were adopted in 1961 (75 Stat. 65) to extend protection to employees who, although not themselves engaged in commerce or in the production of goods for commerce, are employed in an enterprise that is so engaged. H. Rep. No. 75, 87th Cong., 1st Sess., p. 7; S. Rep. No. 145, 87th Cong., 1st Sess., pp. 5–7, 40–41; see also *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 517. Such an enterprise was defined as one which, in addition to having some employees engaged in commerce-connected activities, had an "annual gross volume of sales of * * * not less than $1,000,000" (75 Stat. at 66). The purpose of the dollar volume test, as is clear from the legislative reports, was to differentiate for coverage purposes on the basis of the size of the enterprise's operations and their impact on commerce. Thus, both the House and Senate Reports stated that the new provisions would cover "large enterprises of various kinds * * * which, because of their size and importance to our national economy, should be brought within the coverage of the act," including "real estate" firms (H. Rep. No. 75, *supra*, pp. 3, 7, 13; S. Rep. No. 145, *supra*, pp. 6–7, 31; see also the Labor Subcommittee staff report offered on the floor by Senator McNamara, 107 Cong. Rec. 5842).

Petitioners' discussion of the dollar volume test ignores this part of the legislative history and focuses instead on the Senate Report's use of the word "afford," which they contend demonstrates an intent to measure the "size" of an enterprise by its gross income and not by the gross receipts (or "sales") which result from its activities.[4] Congress, however, used the term "sales," not "income," and it defined this term as including "*any* sale" (Section 3(k); emphasis added), which, on its face, embraces *all* sales, whether made by one as an agent or as a principal.[5] Any possible doubt of the congressional intent in this regard is dispelled by the Fair Labor Standards

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[4] The full paragraph of the Senate Report reads as follows: "Finally, the million dollar test in the committee bill is not the constitutional standard for coverage. The constitutional standard for coverage is contained in these requirements which have just been discussed. The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law" (S. Rep. No. 145, *supra*, p. 5). When the sentences cited by petitioners are read in context, together with the subsequent statements at pages 6–7 of the Senate Report (quoted above), it is clear that Congress was concerned not with who *could*, but with who *should* pay the minimum—based on the size of the enterprise's activities and the impact of those activities on commerce.

[5] The breadth of the word "sale" is confirmed by the proviso to Section 3(s)(1), which excludes from annual gross sales any "excise taxes at the retail level which are separately stated." If, as petitioners contend, Congress had intended the dollar volume test to apply only to those receipts which are *owned* by the enterprise, express exclusion of excise taxes, which are collected by the enterprise on behalf of the government, would

Amendments of 1966 (80 Stat. 830, 831), which substituted the phrase "annual gross volume of sales made or business done" for the earlier phrase "annual gross volume of sales."[6] As explained in the accompanying Senate Report (emphasis added):[7]

> This test * * * is intended to *measure the size of an enterprise* for purposes of enterprise coverage *in terms* of the annual gross volume in dollars (exclusive of specified taxes) *of the business transactions which result from activities of the enterprise*, regardless of whether such transactions are "sales" in a technical sense.
>
> * * * The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3(s), will thus continue [under the 1966 Amendments] to include both

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have been unnecessary. Further evidence that Congress did not intend the result petitioners seek is found later in the Senate Report (S. Rep. No. 145, *supra*, p. 38):

"The method of calculating the requisite dollar volume of sales or business [for enterprise coverage purposes] will be the same as is now followed under the law with respect to calculating the annual dollar volume of sales in retail and service establishments, and in laundries under the exemptions provided in section 13(a)(2), (3), (4), and (13) of the act. The procedure for making the calculation is set forth in the Department's interpretative Bulletin [pertaining to retailers of goods and services]. As it is there stated, the 'annual dollar volume of sales' consists of the *gross receipts from all types of sales* during a 12-month period" (emphasis added).

[6] The 1966 Amendments, under which this suit was brought, also reduced the dollar volume requirement to $500,000 for the period from February 1, 1967, to January 31, 1969, and to $250,000 thereafter.

[7] S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 7–8.

the gross dollar volume of the sales (as defined in sec. 3(k)) which it makes, *as measured by the price paid by the purchaser* for the property or services sold to him (exclusive of any excise taxes at the retail level which are separately stated), *and the gross dollar volume of any other business activity* in which the enterprise engages *which can be similarly measured on a dollar basis. This would include*, for example, *such activity* by an enterprise *as* making loans or renting or *leasing property of any kind.*

Clearly, therefore, petitioners' size—for purposes of enterprise coverage—is to be measured by the volume of gross rentals resulting from their activities in renting and managing the several apartment buildings.[4] As the Tenth Circuit stated in a similar case: "Management [Company] markets the property under its control by renting or leasing space to tenants. This is a 'disposition' within the statutory definition, and, we believe, conforms with the congressional intent to set a standard of size of those businesses which would be covered by the 1961 amendments" (*Wirtz* v. *First National Bank and Trust Company*, 365 F.2d 641, 645).

[4] Contrary to petitioners' assertion (Br. 13), the management company and the bank involved in the *First National* case were separate corporations, and the management company simply managed the buildings owned by the bank. Although the Tenth Circuit concluded that the two corporations constituted a single enterprise, it also held that the management company was itself a covered enterprise, since its annual gross volume of sales, measured by gross rentals and not by commissions, exceeded $1 million.

C. MEASUREMENT OF THE SIZE OF PETITIONERS' ENTERPRISE BY ITS RENTAL VOLUME COMPORTS WITH ECONOMIC REALITY

Petitioners' contention that consideration of rents rather than just commissions "deviate[s] from the congressional intention to cover businesses in an economically realistic manner" (Br. 15) does not withstand analysis in light of the congressional intent to predicate coverage on the extent of an enterprise's impact on commerce.

Petitioners, like the management company in *First National, supra,* are actively engaged in marketing space at the 30 apartment projects covered by their contractual arrangements with the building owners. It is they, not the building owners, who make the sales of this space.

Moreover, unlike a collection agency, which merely collects rents from tardy tenants, petitioners hire, fire and supervise more than one hundred maintenance, rental and clerical workers engaged in every aspect of apartment management and operation. These workers, under the direction of petitioners' management department, advertise vacant apartments, interview prospective tenants, negotiate leases, handle tenant complaints, represent the owner in all litigation, prepare budget proposals, maintain all accounts and necessary records, develop marketing and operating policies, negotiate contracts for services and major repairs, redecorate the apartments, and generally maintain and repair the property. It is petitioners, not the building owners, who, using the rent receipts which they collect, pay for all services and repairs and purchase all supplies needed for the operation and main-

tenance of the 30 apartment buildings, including, for example, fuel, paint, plumbing and heating supplies, carpentry materials, etc.—substantial quantities of which originate outside the State.

In these circumstances, the fact that the buildings are owned by others does not reduce the magnitude of petitioners' marketing activities, nor does it diminish the impact of those activities on commerce. As the Sixth Circuit stated in *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F.2d 198, in rejecting the employer's claim that its construction activities did not meet the dollar volume test for enterprise coverage because the completed structures (which had an assessed value of more than $1 million) were never sold (*id.* at 199–200):

> The underlying concern of the Act is the impact of the particular activity upon interstate commerce. From this perspective the ultimate disposition of the construction has little relevance. The important consideration is whether the activity which went into the actual building process is likely to have an effect on the flow of men, money, and materials across state lines. In this case Congress has exercised the legislative judgment that any activity which creates a business volume of $350,000 or more [in the case of construction enterprises] is likely to have a substantial impact on the channels of the national economic system. The fact that the contractor does not sell the building after its completion does not mean that in constructing it for his own purposes he did not set in motion substantial interstate commercial activities or avail himself of the facilities of other interstate enterprises.

So here, petitioners' activities in selling space at the 30 apartment projects under their control have the same "effect on the flow of men, money, and materials across state lines" as they would if petitioners owned the buildings. Regardless of ownership, "the business transactions which result from [these] activities" are lease agreements (i.e., the sale of space), and their gross dollar volume—for purposes of determining the size of petitioners' enterprise—is to be measured by gross rent receipts, as the court below held.*

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*There is, moreover, no reason to assume that petitioners realize less net income from their activities in managing these buildings than they would if they owned the buildings. Although gross rentals "belong" to the building owners, these sums must be used to pay all the expenses of operation. That Congress could never have intended to condition coverage on "ownership" of the gross receipts generated from the activities of an enterprise is clear from its coverage of gasoline service establishments (Section 3(s)(1)). Gasoline is frequently sold under consignment arrangements whereby the station's gross receipts are the property of the consigning oil refiner. The station, however, will net approximately the same income as a station of comparable size which purchases the gasoline in advance and pays for these goods out of gross receipts.

In any event, the Act has never been concerned with profits. Thus, in *Northwestern-Hanna Fuel Co.* v. *McComb*, 166 F.2d 932 (C.A. 8), where the employer argued that its accommodation sales to other coal dealers should not be counted as "sales" for purposes of Section 13(a)(2) since they were made without profit, the court rejected the argument, stating (*id.* at 937): "* * * But [the dealer sales] were actual sales transactions; the fact that they were made without profit did not change their legal aspect; they involved work operations which appellant's employees were engaged to perform; * * * [and] the trial court therefore was not required to ignore these sales, as appellant contends."

Petitioners and the district court are incorrect in suggesting that measurement of the size of petitioners' enterprise by their sales of rental space is tantamount to including, as a general proposition, all sums "which pass through [a] business" (Br. 14). The comparison to deposits received by a bank or collections made on behalf of clients by a law firm (neither of which would be considered by the Secretary in measuring the size of those enterprises) is unsound. The deposits of sums of money with a bank for safekeeping do not involve a "sale" of anything by the bank; rather a bank "sells" the use of money (*i.e.*, loans), and the proper measure of the dollar volume of its business is the charges it makes for the use of that money (*i.e.*, interest). See *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, 362 F. 2d 857, 863 (C.A. 5). Similarly, the collection of judgments by a law firm does not constitute "sales made or business done" by the firm; what the law firm sells are its services in collecting debts owed to its clients or in obtaining judgments, and the dollar volume of this business for purposes of the Act is accordingly measured by the firm's fees. Petitioners' situation is significantly different from that of the bank or the law firm, since petitioners not only sell their management services to the building owners (the volume of which is measured by commissions), but they also sell rental space to the buildings' tenants.[16]

[16] For these reasons, the Secretary has always distinguished between rental collection agencies and building management companies. See, *e.g.*, Opinion Letters Nos. 182 (September 9, 1963) and 227 (January 31, 1964), 91 Wage and Hour Manual

D. THE DECISION OF THE COURT OF APPEALS FOLLOWS THE WEIGHT OF JUDICIAL PRECEDENT

Contentions such as petitioners here make have been rejected by every appellate court that has considered the rent/commissions issue. In addition to the decision below in the instant case, see *Hodgson* v. *Arnheim & Neely, Inc.*, 444 F. 2d 609, 612 (C.A. 3), reversed on other grounds *sub nom. Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512; *Wirtz* v. *Jernigan*, 405 F. 2d 155 (C.A. 5); *Wirtz* v. *First National Bank and Trust Co.*, 365 F. 2d 641 (C.A. 10); cf. *Montalvo* v. *Tower Life Building*, 426 F. 2d 1135 (C.A. 5).[11]

In *Jernigan*, *supra*, the employer, a restaurant owner who operated a Greyhound bus agency on the same premises, argued that his annual "sales" from the bus agency operation should be measured by his commissions and not by the ticket receipts, which he

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1034c, 1024, CCH Administrative Rulings ¶30,771 and ¶30,820; unnumbered opinion letter of the Administrator dated September 28, 1967, 91 Wage and Hour Manual 1034g. Since the activities of a collection agency result not in sales of space but only in the collection of rents, the size of its business is properly measured by its commissions, which represent the price paid for its services. These consistent and long-standing interpretations by the administrators of the Act are "entitled to great weight." *E.g.*, *Roland Co.* v. *Walling*, 326 U.S. 657, 676; *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549. See also *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 205, 207–208; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140.

[11] The "split of authority" claimed by petitioners (Br. 12–13) relates to two district court cases of considerably earlier vintage (*Schmidt* v. *Randall*, 160 F. Supp. 228 (D. Minn.); *Mitchell* v. *Carratt*, 160 F. Supp. 261 (S.D. Fla.)). Both of those cases, which involved fact situations identical to that in *Jernigan*, were expressly disapproved in the *Jernigan* opinion, 405 F. 2d at 158–159.

transmitted to Greyhound. The district court agreed, stating that "[o]nly the commissions or other compensation received by Defendant for his own account * * * constitute a part of [his] 'dollar volume of sales'" (*Wirtz* v. *Jernigan*, 18 WH Cases 111, 115, 55 CCH Lab. Cas. ¶ 31,948 (S.D. Ala.)). The Fifth Circuit reversed, holding that the total proceeds from the ticket sales had to be included in determining the employer's annual dollar volume of sales. In reaching this result, the court emphasized that the restaurant owner did not exercise a "mere custodial function" with respect to the bus agency operation, as does for example the store proprietor who "permits a vending machine to be placed on his premises" (405 F. 2d at 159), but provided "a whole range of facilities and service in connection with his transportation function" (*id.* at 158–159).

The *Jernigan* case cannot properly be distinguished, as petitioners suggest (Br. 13), on the ground that the defendant there owned his own establishment. Jernigan was not engaged in selling building space but in selling space on buses, which he neither owned nor operated. Nor did he "own" the receipts from these sales, but, like petitioners, he was required to remit the receipts to his principal.

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[12] Although *Jernigan* involved the retail establishment exemption of Section 13(a)(2) rather than the enterprise coverage provision of Section 3(s), the application of both provisions depends upon the same definition of "sale" contained in Section 3(k) of the Act, and the Senate Report on the "enterprise" provisions explicitly stated that gross sales should be measured in the same way for both sections. See note 5, *supra*.

The governing principle is further illuminated by *Montalvo v. Tower Life Building*, *supra*, in which the court rejected an insurance company's argument that its gross sales should not include any policy premiums that are the property of its selling agents. The court held that "the seller's *disposition* of the money paid by a purchaser cannot reduce the gross amount of the sale" as "'measured by *the price paid by the purchaser*'" (426 F. 2d at 1142). Similarly, here the price paid by the purchasers to whom petitioners sell rental space is measured by the gross rental receipts."

II. PETITIONERS ARE THE EMPLOYERS OF THE BUILDING MAINTENANCE EMPLOYEES FOR COVERAGE PURPOSES

This action was brought against petitioners on the theory that the workers at the buildings managed by petitioners are employed in petitioners' enterprise. This theory is firmly rooted both in the language of the Act itself and in the economic realities of the relationship between petitioners and these workers. Nothing in the language or history of the statute, the

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[11] Should this Court decide, contrary to our contention, that the size of petitioners' real estate management operations is to be measured by their commissions, that conclusion would not be dispositive of the ultimate coverage issues in this case. Petitioners also sell insurance and real estate, and inclusion of insurance sales would likely bring their annual gross volume of sales made or business done to more than $500,000. The question whether the insurance, real estate sales, and real estate management aspects of their business are "related activities" for enterprise coverage purposes is one that would be appropriate for determination by the district court on remand, if the Court were to reverse the court of appeals on the commissions/rents issue.

decided cases, or the application of sound reason suggests a contrary conclusion.

A. THE CONCLUSION OF THE COURT OF APPEALS THAT THE BUILDING WORKERS ARE EMPLOYED IN PETITIONERS' ENTERPRISE IS REQUIRED BY THE PROVISIONS OF THE ACT AND THE REALITIES OF THE ECONOMIC RELATIONSHIPS INVOLVED

In our view, the correct resolution of the "employment" issue turns on two simple and straightforward propositions, both of which lead to the conclusion that the building workers are employed in petitioners' enterprise and entitled to the benefits of the Act flowing therefrom: (1) The clear language of the Act requires that conclusion; and (2) the workers are hired, fired, and controlled by petitioners and are essential to the conduct of petitioners' building management enterprise and are therefore, as a matter of economic reality, employed in that enterprise.

Section 6 of the Act, 29 U.S.C. 206, provides that "[e]very employer shall pay to each of his employees who * * * is employed in an enterprise engaged in commerce" the prescribed minimum wage, and Section 7, 29 U.S.C. 207, imposes overtime requirements in substantially identical language. The terms "employer", "employee", and "employed" as used in these provisions are defined in Section 3.

"Employer" is defined in Section 3(d) to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *." As Mr. Justice White observed in his dissenting opinion in *Arnheim & Neely* (410 U.S. at

525), this language "unquestionably" makes the management company the employer of these employees for purposes of the Act, as petitioners concede (Br. 16).

"Employee" is defined in Section 3(e) to include "any individual employed by an employer * * *." Nothing in this definition affords any support for petitioners' rather unusual contention (Br. 20) that they can be employers of these workers without the workers being their employees.

This contention—which is, in effect, that the workers to whom petitioners bear the relationship of employer are somehow not "employed by" them—founders, in any event, on the definition of "employ" in Section 3(g), which "includes to suffer or permit to work." Since petitioners do the hiring and firing, they "employ" the workers within the plain meaning of this statutory definition.

Petitioners suggest that the fact that they are defined as employers by Section 3(d) should not be dispositive of the applicability of Sections 6 and 7 to their relationship with the building workers (Br. 20-21). But nothing in the language of the Act supports this suggestion that these key terms may have a different meaning as used in the latter provisions. Indeed, Section 3, which is entitled "Definitions", plainly states that it defines the terms "[a]s used in this chapter." There would, after all, be little point in having a definitional provision in a statute if the definitions it sets forth were not to be applied to the interpretation of its substantive provisions.

Furthermore, contrary to the underlying thesis of the brief of the *amicus* Realty Advisory Board, the conclusion that these workers are employed in petitioners' enterprise is supported by much more than a mere literal application of the statutory definition. Petitioners' relationship to these employees is more than a derivative or technical one arising out of a formalistic application of a label as an agent; it is far more than the "flimsy and tenuous" relationship to which *amicus* adverts (Br. 5). Every significant incident of the building maintenance workers' employment—hiring, discharge, job assignments, hours of work, supervision of work, and payment—is controlled by petitioners. Thus, petitioners not only meet the liberal criteria for "employer" status contained in the Act, they fully satisfy the far more stringent common law test, as they concede (Br. 24).

Indeed, to the extent the roles of the building owners and petitioners can be characterized as primary and secondary with relation to these employees, it is petitioners who are the primary employers by any applicable standards. The management contract gives the building owners no role and not even a veto power with respect to hiring, discharge, and job supervision, all of which are within petitioners' exclusive province (even though, as indicated in the Statement, *supra*, p. 6, petitioners' apparent practice is to secure the approval of the owners for the assignment of an individual worker to more than one building). The sole contractual power of the building owners is

the approval of overall operating budgets for their buildings, which of course include items for labor expense (App. 52–53, 60–61).[14]

Apart from the specifics of the working relationship between petitioners and the building maintenance employees, the determination of this issue by the court of appeals is further supported by the fact that the work done by the employees is not only essential to the successful performance of petitioners' other contractual obligations to the building owners, but it is as much an "integral part" of petitioners' independent real estate management business (see *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729) as is the work of their clerical staff and other admitted employees. In short, petitioners not only "stand in the shoes of the building owners" with respect to the employment of the building maintenance workers; they employ these workers as indispensable executors of a major part of the operation

[14] It is, of course, immaterial that the actual hiring and supervision of the building maintenance workers is handled by the "project manager" or "maintenance superintendent" employed at each building. The superintendents are hired by petitioners and are under the direct supervision of the area managers, who are admittedly employees of the petitioners and who have a "veto" power over any decisions of the superintendents "with respect to hiring, firing and setting wage rates" (App. 34, 43–46). Contrary to petitioners' statement (Br. 23), the superintendents do not review the budgets with the building owners. According to the stipulation, "Defendants' [petitioners'] officials review and revise the budget and present it, with their recommendation, to the project owner for approval. The maintenance superintendent does not normally discuss the formal budget with the owner" (App. 45).

of petitioners' own business.

Whenever this question has arisen in cases involving facts similar to those presented here, the courts have, with one exception, imposed monetary liability upon building management companies for their failure to observe the Act's requirements. See *Shultz* v. *Arnheim & Neely, Inc.*, 324 F. Supp. 987, 997–998 (W.D. Pa.), affirmed on this issue *sub nom. Hodgson* v. *Arnheim & Neely, Inc.*, 444 F. 2d 609, 611–612 (C.A. 3), reversed on other grounds *sub nom. Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512; *Greenberg* v. *Arsenal Bldg. Corporation*, 144 F. 2d 292, 294 (C.A. 2), reversed in part on other grounds *sub nom. Brooklyn Bank* v. *O'Neil*, 324 U.S. 697; *Asselta* v. *149 Madison Avenue Corporation*, 65 F. Supp. 385, 389 (S.D. N.Y.), affirmed, 156 F. 2d 139 (C.A. 2), affirmed, 331 U.S. 199; *Barrow* v. *Adams & Co. Real Estate*, 46 N.Y.S. 2d 357, 359–360 (Munic. Ct.).[15] Similarly, a building management company has been held to be an employer for purposes of obligations imposed by the National Labor Relations Act even though the building owner, an international organization, was specifically exempt. See *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 385 F. 2d 684, 685–686 (C.A.D.C.); *Herbert Harvey, Inc.* v. *National*

[15] The sole decision holding that suit could not be brought against the building management company, *Mungovan* v. *Manierre*, 7 Lab. Cas. para. 61,646 (N.D. Ill.), is a district court decision rendered in 1943, prior to the decisions in any of the cases cited above.

Labor Relations Board, 424 F. 2d 770, 774 (C.A.D.C.); cf. *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6).

The employment relationship existing between petitioners and the building maintenance workers is not destroyed by the provision in petitioners' contracts with the building owners that such workers are "deemed employees of [o]wners" (App. 53, 60). As this Court emphasized in *Rutherford Food Corp.* v. *McComb, supra*, the determination of whether there is an employment relationship subject to the Act depends not on any "label" used to describe the relationship, but on the Act's "own definitions" (331 U.S. at 729). See also *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633, 636 (C.A. 4), certiorari denied, 338 U.S. 900; *Mitchell* v. *Strickland Transportation Co.*, 228 F. 2d 124, 126 (C.A. 5); *Mitchell* v. *John R. Cowley & Bro., Inc.*, 292 F. 2d 105, 107–108 (C.A. 5). Nor do the Act's definitions depend on how the building maintenance workers may view their relationship.[10] *Gulf King Shrimp Company* v. *Wirtz*, 407 F. 2d 508, 512 (C.A. 5).

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[10] In fact, however, nothing in the record supports petitioners' contention that the building maintenance workers "feel allegiance to the [building] owner" (Br. 23). On the contrary, it was stipulated that even the superintendents "may not know who the owners of the project[s] are" (App. 46) and that they "look to the defendants [petitioners] for supervision and direction" (*ibid.*). Although building maintenance workers have generally remained with a building after petitioners lost the building management contract, this presumably was with the agreement of any new building management company and was likely to have been for reasons other than "allegiance" to a building owner whom none of the workers knew.

B. PETITIONERS' REMAINING ARGUMENTS DO NOT SUPPORT THEIR CONTENTION THAT THE BUILDING MAINTENANCE WORKERS ARE NOT THEIR EMPLOYEES

1. Petitioners contend (Br. 15–18) that the decision of the court of appeals overrules *Maryland* v. *Wirtz*, 392 U.S. 183, by expanding the category of employers subject to the requirements of the Act. *Maryland* did not involve any question of the definition of "employer", but rather questions regarding the constitutionality of the "enterprise" concept, which, to the extent they may be relevant here, were resolved favorably to the government's position in *Arnheim & Neely*. The class of "employers" has remained unchanged since the passage of the Act in 1938, and it is apparent from the *Greenberg* and *Asselta* decisions, *supra*, that building management companies are not, as petitioners suggest, a new class of employers.

The reason apartment house management companies were not generally covered before the 1966 enterprise amendments had nothing to do with their status as employers under the Act; it was because apartment houses normally have no employees who are themselves engaged in commerce-connected activities. Former Section 3(s) required that each building (or "establishment") have some employees in this category in order for there to be coverage; as amended in 1966, the Act requires only that the enterprise, as opposed to each establishment, have some employees engaged in commerce-connected activities, a requirement almost always satisfied by the traditionally covered activities of a management company's central office personnel.

Nor is it accurate to suggest that the decision of the court of appeals makes coverage "illusory" because it could be terminated by the discharge of petitioners as building managers, although "[n]othing has changed as far as the employee is concerned" (Br. 17–18). The loss of coverage in such a case would result from the highly relevant change that petitioners would no longer be the employers of the workers, and the workers would thus no longer be employed in a covered enterprise.

Finally, the charge that the government's theory ignores petitioners' status as an agent does not further petitioners' position. The mere fact that petitioners label themselves "agents" does not confer immunity from the Act.[17] The Act contains no exemption for agents; on the contrary, Section 3(d) was clearly written for the purpose of imposing responsibility upon an agent, and, as the court of appeals observed in *Greenberg* v. *Arsenal Bldg. Corporation, supra,* 144 F. 2d at 294, "the section would have little meaning or effect if such were not the case."

2. Petitioners next argue that they are not employers under Section 3(d) because they do not act "in relation to an employee" (Br. 18–19). This is a rather puzzling contention, since it is difficult to understand what petitioners are acting in relation to in hiring, supervising, and paying the building workers

[17] Notwithstanding their self-assigned status as "agents," it seems clear that petitioners are independent contractors rather than servants in their relationship to the building owners. See ALI, *Restatement of Agency 2d* § 220 (1958).

if not "in relation to an employee." This statutory language was clearly meant to distinguish between persons such as petitioners, who were to be covered, and persons such as lawyers, accountants, and advertising agents who might act "in the interest of an employer" but would not be covered because they did not do so in relation to the employee.

The case of *McComb* v. *McKay*, 164 F. 2d 40 (C.A. 8), relied on by petitioners, would be apposite if the Secretary were seeking to fasten liability on the building superintendents, who conduct the day to day supervision of the building workers under the general direction and control of petitioners. However, since the building superintendents are themselves simply employees of petitioners and not, like petitioners, independent business entrepreneurs, they would fall within what amounts to a "fellow servant" exception to Section 3(d) recognized in *McKay*.

Other cases cited by petitioners (Br. 21) are not helpful to their position. In *Hodgson* v. *Royal Crown Bottling Co., Inc.*, 324 F. Supp. 342 (N.D. Miss.), affirmed, 465 F. 2d 473 (C.A. 5) (bottling company held liable with respect to drivers' helpers), and *Rutherford Food Corp.* v. *McComb*, *supra*, as in *McKay*, the intermediary was merely an employee of the person found to be liable as an employer, and not an independent entrepreneur. In *Maddox* v. *Jones*, 42 F. Supp. 35 (N.D. Ala.), it was held that the intermediary, as an independent contractor, was the party liable for payment of the statutory wages. If the principle of

Maddox were applied to the present case, petitioners would be considered the sole employers of the building workers and would be liable (see note 19, *infra*). In *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, it was held that the persons involved were not employees, a question unrelated to that posed [illegible] here. No "intermediaries" or "agents" were involved in *United States* v. *Rosenwasser*, 323 U.S. 360, or in *Williams* v. *Terminal Co.*, 315 U.S. 386, in both of which the employees were found to be covered under the Act. In the only other case cited by petitioners, *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461 (E.D. Mo.), the district court excluded one building from the management company's enterprise based on its findings that the building maintenance employees, unlike those here, were neither hired, fired, nor controlled by the management company and were, therefore, not its employees.

3. Petitioners also claim (Br. 21–25) that the holding of the court of appeals that they are employers of the building workers does not comport with the "economic reality" test developed by this Court in Fair Labor Standards Act cases (*e.g.*, *Rutherford Food Corp.* v. *McComb*, *supra*, 331 U.S. at 727). But this test has never been applied, and never was intended, to defeat coverage by overcoming a finding of an employment relationship based upon both the language of the Act itself and the common law standards for such relationships. On the contrary, it was fashioned by this Court in interpreting and applying the social legislation of the 1930s, including the Fair Labor

Standards Act, which defined the employment relationship in much "broader or more comprehensive" terms than the common law. *United States* v. *Rosenwasser, supra,* 323 U.S. at 362. As explained in *Rutherford Food, supra,* the "economic reality" test is designed to bring within, rather than exclude from, such legislation "persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category" (331 U.S. at 729). See also *Goldberg* v. *Whitaker House Coop.,* 366 U.S. 28.

Wholly apart from the expansive purpose of the "economic reality" test, the economic realities of petitioners' relationship to the building workers hardly entitle them to some unwritten exemption from the requirements of the Act. The only significant connection that petitioners are able to adduce between the building owners and the workers (and, correspondingly, the only exception to petitioners' full control over these employees) is in the area of responsibility for payment of salaries.[14] But petitioners are not relieved of their legal responsibilities as an employer because they do not bear the cost of the wages paid to the building maintenance workers. The courts, including this Court, have repeatedly held that there may be

[14] Even with respect to this matter, it is by no means clear that petitioners, who are concededly employers of the building workers by common law standards, can successfully escape their duty to pay compensation to their employees by delegation to the building owners. They cite no authority for the proposition that, should the building owners fail to pay the workers' salaries, the workers could not look to petitioners for payment under State contract law as well as under the Act.

an employment relationship in a variety of situations where the compensation is derived from sources other than the employer's pocketbook. See, *e.g.*, *Williams* v. *Terminal Co.*, *supra*, 315 U.S. 386; *Southern Ry. Co.* v. *Black*, 127 F. 2d 280 (C.A. 4). As the Fourth Circuit pointed out in *Southern Ry.* when it held that "red caps" were employees of the railroad despite the fact that they were compensated by the passenger (*id.* at 281–282):

> The determinative factor is not the source of their compensation, but the fact that they render services which are necessary to the proper running of [petitioners' business], that they are hired or selected [by petitioners] and permitted by them to render these services, that they are subject to the general supervision and control of [petitioners] in rendering the services and that the [petitioners] have the power to discharge them. * * *

Under these tests, petitioners are, as held by the court below, an "employer" of the building maintenance workers and are responsible under Sections 6 and 7 of the Act for their unpaid statutory wages.

Finally, the entire thrust of petitioners' "economic reality" argument is based on the erroneous premise that there can be only one employer. This contention has been repeatedly rejected by this Court and other courts, not only in the context of real estate management companies (see *Greenberg*, *Asselta*, and other cases cited at pp. 29–30, *supra*), but also in other contexts under both the Fair Labor Standards Act and the National Labor Relations Act. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481; *Hodgson* v. *Okada*

Farms, Inc., 472 F.2d 965 (C.A. 10); *Hodgson* v. *Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (C.A. 5), petition for certiorari pending, No. 72-1395; *Beaver* v. *Jacuzzi Brothers, Inc.*, 454 F.2d 284, 285 (C.A. 8); *National Labor Relations Board* v. *Jewell Smokeless Coal Corporation*, 435 F.2d 1270, 1271-1272 (C.A. 4)."

4. The arguments advanced by the *amicus* Realty Advisory Board also fail to show the absence of an employment relationship between petitioners and the building maintenance workers. Fundamentally, its brief seeks to reargue the proposition that the "enterprise" amendments were designed to protect small businesses from the payment of minimum wages and observance of the overtime requirements, and that this "purpose" should override the language of the Act itself and the other purposes of the legislation. To the extent this contention has any relevance, it bears on the issue of the proper definition of an "enterprise" and was rejected by this Court in *Arnheim & Neely*. Neither the 1961 nor the 1966 amendments to the Act involved any change in the definition of "employer", "employee", and "employ" in Section 3 or in the meaning and use of those terms in Sections 6 and 7.

The *amicus* attempts to establish (Br. 18-21),

[10] To the extent that the district court's decision in *Maddox* v. *Jones*, *supra*, suggested that a joint employment relationship could not exist between employees of an independent contractor and the person engaging the services of the independent contractor, it is contrary to all of the more recent appellate decisions cited above. Moreover, *Maddox*, if correct, would support the proposition that only petitioners, and not the building owners, are liable under the Act.

through its discussion of such cases as *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 380 F. 2d 903 (C.A. 6), that the building owners are employers of these employees, thereby indicating that the employees' rights to the benefits of the Act could be founded upon their relationship to the owner if the latter's "enterprise" were covered under the Act. That petitioners, in their role as agents, would have derivative liability if the building owners were liable by virtue of their enterprises (even though petitioners' enterprise were not covered) is true but irrelevant, since the case turns not on a theory of derivative liability but on the workers' employment in petitioners' building management enterprise.

The *amicus* errs in asserting that the *Greenberg* and *Asselta* decisions somehow stand for the proposition that the management company is not the "actual" employer of the people it uses to execute its building management function (Br. 25). While those decisions do indicate that derivative liability exists—a proposition with which we have no quarrel—they contain nothing to suggest that the building workers may not be considered direct employees of the management company, or that a person who has derivative liability is thereby exempted from direct liability for his employees.

The recurring fault in the *amicus'* analysis of the employer/employee issue is the assumption that the principal reason Congress enacted the Fair Labor Standards Act was to protect small businesses from payment of the minimum wage (*e.g.*, Br. 18, 29) rather than to raise the standards of pay and work-

ing conditions for workers at the lower end of the economic spectrum." It is on that erroneous premise that the *amicus* constructs an argument that because the building owners' enterprises are too small to be

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[39] There is, of course, no broad exemption for small businesses, as suggested by the *amicus*. Thus, the Act's coverage has always applied to employees engaged in commerce or in the production of goods for commerce, whether their employer be a large or a small business. See, *e.g.*, *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388 (Act applied to a custom furniture establishment which also fabricated airplane parts and which had an annual dollar volume of $99,117); *Wirtz* v. *Floridice Company*, 381 F.2d 613 (C.A. 5) (Act applied to a company whose annual sales ranged from $55,861 to $89,692). Cf. *Hodgson* v. *A–1 Ambulance Service*, 455 F.2d 372, 373–374 (C.A. 8) (reversing a district court order relieving an ambulance company of its liability under the Act on the ground that otherwise the company would "go out of business" and leave the City of Little Rock without an ambulance service).

Amicus' argument regarding the economic impact of coverage exaggerates the problem. Labor costs represent only a small part of the total cost of operating an apartment house or office building—7.4 percent and 18.6 percent, respectively. *Apartment Building Income Expense Analysis*, 1970, Chicago: Experience Exchange Committee of the Real Estate Boards of the National Association of Real Estate Boards; *1969 Office Building Experience Exchange Report*, Building Owners and Managers Association (1969), p. 4. In any event, the increased costs to the building owners are substantially offset by the economic advantages gained from engaging petitioners. The building owners are the beneficiaries of petitioners' ability to make bulk purchases of supplies, to offer the services of experienced management personnel who also manage other buildings, to provide efficient centralized billing and collection services, and otherwise to operate the buildings more efficiently and at lower cost than would be possible if each building were managed separately.

CONCLUSION

covered,[21] the building workers must be denied the benefits of the Act regardless of the size and coverage of their other (indeed, primary) employer. The Act contains no such deprivation of minimum wage and maximum hour protection for workers simply because application of the Act to a covered enterprise by which they are employed would result in an increase in the cost of that enterprise's services to other, non-covered enterprises; nor is it an unusual economic effect for some or all of the costs of compliance with the Act to be passed along to non-covered persons doing business with the covered enterprise.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[21] While the building owners' enterprises are "small" for the technical purposes of the Act, these are hardly "mom and pop" enterprises. During 1968, the average rental collections at the 30 buildings managed by petitioners amounted to nearly $300,000 per building (App. 17)—which suggests an average asset value of the buildings of several million dollars each

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